

SOUTH AFRICA / JUDGMENT

O'Sullivan and Another v National Director of Public Prosecutions and Others (63929/2017) [2017] ZAGPPHC 655 (6 October 2017)

[2017] ZAGPPHC 655

COURT

North Gauteng High Court, Pretoria

BEFORE

M.W. Msimeki

CASE / FILE NUMBER

63929/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: 63929/2017

NOT REPORTABLE

OF INTEREST TO OTHER JUDGES:NO

REVISED

6/10/2017

PAUL ROBERTO' SULLIVAN First Applicant

MELISSA NAIDU Second Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

THE MINISTER OF POLICE Second Respondent

ADV J J MLOTSHWA Third Respondent

JUDGMENT

MSIMEKI J, INTRODUCTION

[1] The two applicants, in this application, seek an order that:

- "1. This application is declared to be urgent and non-compliance with the Rules of Court in respect of form, service and time periods are condoned to the extent that it is necessary.
2. Certain Summons in Criminal Case, number 384/2017, dated 14 August 2017, in District Court 2, District Ekurhuleni Central, held at Palm Ridge, of which a copy is annexed hereto as ANNEXURE "NOM1" ("the Summons", is declared to have been issued and served in conflict with the order of the above Honourable Court under case number 75378/2016 dated 16 November 2016 annexed hereto as ANNEXURE "NOM2 " and is set aside.
 3. That the First Respondent and the Second Respondent be interdicted to issue or cause to be issued any further summons against the Applicants in contravention of the court order of 16 November 2016.

Alternatively, and in the event of the Honourable Court not being in a position on 26 September 2017 to finally adjudicate on the relief sought in prayers 2 and 3 above the relief in prayer 4 below will be sought:

4. That the further prosecution of the Applicants in terms of the Summons referred to in prayer 2 above be suspended and interdicted pending the final adjudication of the relief sought in prayers 2 and 3 above.
5. Costs of the Application on the scale between attorney and client.
6. Further and/or alternative relief'.

BRIEF

BACKGROUND

- [2] The matter concerns what occurred many years ago. The first applicant appears to have brought two applications under case number 75378/2016. Two draft orders were made Court orders. The one draft order appears on page 11 of the paginated papers marked "NOM2" and "NPA". It bears a hand written date of 15 November 2016. The second draft order appears on page 126 of the papers marked "PS-7" and "Police". It also bears a handwritten date of 15 November
2016. In the two draft orders the respondents are the same. The applicant in the two applications is the first applicant in the current application. The contents of the draft orders, however, are different. The applicants, in the current application, are two while the respondents are three. The third respondent in the current application is the eighth respondent in the two draft orders which have 9 respondents. This is Advocate J. J Mlotshwa who is the prosecutor in the Alberton CAS 799/11/2013 case, the subject matter in this application. The problems that the parties faced at the time of the two previous applications resulted in the court orders which I shall refer to hereunder. The current application concerns the first Court Order and in particular the Alberton CAS 799/11/2013. The applicants, on 6 September 2017, were served with a summons which informed them to appear in Palm Ridge District

Court 2 which is within the District of Ekurhuleni Central on 3 October 2017. On Monday, 11 September 2017, the applicants consulted with their Counsel. The consultation resulted in the current application. The applicants, in the current application, contend that the summons should be declared to have been issued and served in conflict with the order of the court under case number 75378/2016 dated 16 November 2016 which is Annexure "NOM 2" and that same be set aside. The applicants also seek a final interdictory order. The respondents

hold a contrary view and request the Court to dismiss the application with costs on a punitive scale.

[3] The applicants were represented by Advocate A. T Lamey (Mr Lamey) while the first and third respondents were represented by Advocate L. Nkos- Thomas SC ("Ms Nkosi-Thomas") who appeared with Advocate G. Ngcangisa ("Mr Ngcangisa"). Advocate Z. Matebese SC ("Mr Matebese") and Advocate Mtsweni ("Mr Mtsweni") represented the second respondents when the matter was argued.

[4] It is apposite to refer to the two draft orders before I deal with the issues in this matter.

[5] The first draft order starts from page 11 - page 14 of the paginated papers and it reads:

"HAVING read the papers filed of record, and by agreement between the parties (but without any admission of liability, and in particular without admission that the applicant is entitled to any relief in relation to Part A), an order in the following terms issues in relation to Part A of the application:

1. The first respondent will undertake a review (pursuant to the request made by the applicant), in accordance with the provisions of section 179(5)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996, as read with section 22(2)(c) of the National Prosecuting Authorities Act 32 of 1998 ("the review provisions" of the decision to prosecute in the following matters:

- 1.1 Kempton Park CAS 679/3/215 ;

- 1.2 Rosebank CAS 47/5/2016 ;

- 1.3 Bramley CAS 414/04/2016.

2. Such review will be conducted in accordance with the standard procedure currently adopted by the first respondent ("the standard procedure"), and pursuant to such representations as the applicant shall make in writing.

3. To the extent that any decision is made to prosecute the applicant in respect of the below mentioned cases, then and in that event, such decision will first be referred to the Acting Special Director of Public Prosecutions: PCLU, Dr Pretorius SC, who shall be required to approve the decision to prosecute therein prior to the issue of any charges against the applicant:

3.1 Pretoria Central CAS 380/4/2016;

3.2 Johannesburg Central CAS 755/5/2014;

3.3 Alberton CAS 799/1112013;

3.4 Midrand CAS 867/06/2016.

4. Should the Acting Special Director of Public Prosecutions: PCLU, approve the issue of charges against the applicant, then and in that event the first respondent will, if requested to do so in writing and after the receipt of written representations from the applicant engage in a review of the decision to prosecute in accordance with the review provisions, and in accordance with the standard procedure.
5. The parties record that, to the extent that any such review culminates unfavourably for the applicant the first

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respondent may then, in his sole and absolute discretion determine whether any such prosecution ought to be conducted by an alternative prosecutor (to wit by a prosecutor other than the prosecutor that made or makes the determination to prosecute): Provided that nothing in this paragraph shall preclude the applicant from instituting fresh proceedings if so advised.

6. Part B is postponed sine die;
7. The costs of the Part A application are reserved for later determination."

[6] The second draft order starts from page 126 of the papers - 128. The Court Order reads:

"HAVING read the papers filed of record, and by agreement between the parties (but without any admission of liability, and in particular without admission that the applicant is entitled to any relief in relation to Part A), an order in the following terms issues in relation to Part A of the application:

1. In any matter, including the charges being investigated under Pretoria Central CAS 382/4/2016, where the First Respondent has taken a decision to prosecute the Applicant and where a warrant of arrest has been obtained for the arrest of the Applicant, the 3rd, 4th, 5th and 6th respondents undertake to afford the Applicant 48 hours notice to present himself at a designated Police Station.
2. In any other matter where the First Respondent has made a decision to prosecute the Applicant, the 3rd, 4th, 5th and 6th Respondents undertake that the applicant be brought to court by way of summons.
3. In any other matter where the determination is made that the arrest of the Applicant is necessary, the 3rd, 4th, 5th and 6th Respondents undertake to afford the Applicant 48 hours' notice to present himself at a designated Police Station.

4. Part B is postponed sine die;
 5. The costs of the Part A application are reserved for later determination".
- [7] Before the matter was argued the parties agreed that the issue of urgency be argued together with the other issues. The parties further agreed to proceed with the matter on the basis that documents which were filed late were to be accepted. I accepted them.

THE

ISSUES

- [8] These are:
1. Whether the issue and the service of a summons marked number 384/17 dated 14 August 2017 which is Annexure "NOM1" to the founding affidavit was in contravention of the first court order which I shall, for the sake of convenience, call the "NPA order".
 2. Whether the matter is urgent, and
 3. Finally, whether the applicants have made out a case to be entitled to the orders that they seek.

COMMON CAUSE FACTS

- [9] These are:
1. That the third respondent is the prosecutor in the Alberton Case bearing CAS 799/11/2013;
 2. That Dr Pretorius is the Acting Special Director of Public prosecution, Priority Crimes and litigation Unit;
 3. That the Director of Public Prosecutions Gauteng local Division, is Advocate M A Chaule ("Mr Chauke");
 4. That Advocate J J Mlotshwa ("Mr Mlotshwa") is the prosecutor Priority Crimes litigation Unit National Prosecuting Authority.
- [10] I have, above, already alluded to the fact that the problems that the first applicant faced resulted in the NPA order and the second order which, again, for convenience purposes, I shall refer to as the SAPS order.
- [11] In response to the issues raised in this matter, the Court, in the main, has to deal with the issue of urgency and the proper interpretation of the NPA order and to a less extent, the SAPS order.
- [12] The applicants, in their interpretation of the NPA order, seems to say that:
1. Dr Pretorius did not approve the issue of the summons and the decision to prosecute the applicants , and

2. In the alternative, if Dr Pretorius had given his approval, the summons could not be issued before the first applicant approached the first respondent for a review of Dr Pretorius's decision to prosecute them.

The respondents do not agree with this interpretation.

[13] On 2 October 2017 I gave an order in this matter and promised that my reasons for such an order would follow.

[14] The matter served before me as an urgent application. Because of this I need to refer to Rule 6(12)(a) and (b) of the Uniform Rules of Court. The Rule reads:

"6 Applications

(12)

- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
 - (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course." (my emphasis).
- [15] Mr Lamey, for the applicants, submitted that the matter was urgent. Contrawise, Ms Nkosi-Thomas and Mr Matebese, for the first and third respondents, and the second respondent, respectively, submitted that the matter was not urgent or the urgency, if at all, was self-created.
- [16] Rule 6 12(a) provides that a judge, in urgent applications, may dispense with the forms and service provided for in the rules and dispose of the matter as he or she deems fit. An affidavit filed in support of an application, in terms of Rule 6(12)(b), shall set forth explicitly the circumstances which an applicant avers render the matter urgent also giving the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. The issue of absence or presence of substantial redress in due course, in the main, determines the urgency of a matter.
- [17] To determine the urgency of this matter, one has to establish if the applicants have complied with the provisions of Rule 6(12)(a) and (b). Fortunate enough guidelines have been set out in our case law to assist courts in the determination of issues of urgency.
- [18] Notshe AJ, in *East Rock Trading 7 (Pty) Ltd and Another v Eagle valley Granite (Pty) Ltd and Others* 2012 JOL 28244 (GSJ) adequately deals with the issue of urgency. He, in paragraphs 6 and 7 of his judgment, states:

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard." (my emphasis).

See: *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A-G and *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) and *Sikwe SA mutual Fire and General* 1977 (3) SA 438 (W) at 440G-44(A).

[19] The above cases and chapter 13.24 paragraph 3.5 of the Practice Manual, clearly demonstrate that applicants are required to set out explicitly the circumstances that render their matters urgent as well as disclosing the reasons enabling them to claim that they cannot be afforded substantial relief and substantial redress at a hearing in due course. It is noteworthy that the giving of the reasons is peremptory. At paragraph 9 of his judgment,

Notshe AJ said:

"[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application." (my emphasis).

[20] In *Mogalakwena Local Municipality v The Provincial Council Limpopo and others* 2016

(4) SA 199 (GP) at paragraphs 63-64 the Court said:

"(63) I proceed to evaluate the Respondent's submissions that the matter is not urgent. The evaluation must be undertaken by an analysis of the Applicant's case together with the allegations by the Respondents

which the Applicant does not dispute. Rule 6(12) confers a general discretion on the Court to hear the matter urgently. Rule 6 (12)(b) provides:

'In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which avers (sic) render the matter urgent (sic) and (sic)

reasons

why he claims (sic) he could not be afforded substantial redress at a hearing in due course'

(64) It seems to me that when an (sic) urgency is an issue. the primary investigation should be to determine whether the Applicant will be afforded substantial redress at the hearing in due course. If the Applicant cannot establish prejudice in this sense. the application cannot be urgent." (my emphasis).

Once such prejudice is established, other factors come into a (sic) consideration. These factors include (but are not limited to): Whether the respondents can adequately represent the case in the time available between notice of the application to them and actual hearing, other prejudice to the Respondents and the administration of justice, the strength of the case made by the Applicant and any delay by the Applicant in asserting his rights. This last factor is also called usually by counsel acting for the Respondent as self- created urgency."

The case bolsters the view that the presence or otherwise of the substantial redress determines the urgency.

[21] The urgency of the matter, according to the applicants, is to be found in paragraphs 7-13 of their founding affidavit. It is, therefore, against the contents of these paragraphs that the issue of whether or not the matter is urgent has to be determined.

[22] In paragraphs 7-13, the applicants state that members of SAPS attempted to serve the summons on them; that the summons called on them to appear in Palm Ridge District Court 2 in the District of Ekurhuleni Central on 3 October 2017; that on 21 August 2017 their attorneys of record wrote a letter to the third respondent making it clear that the service of the summons was in contravention of the NPA order; that those who attempted to serve the summons, and the applicants attorneys of record on 18 August 2017, attended a meeting and that it emerged at that meeting that those who had wanted to serve the summons had been acting on the instructions of the third respondent; that the summons were eventually served on them on 6 September 2017; and that they had a consultation with their Counsel which culminated in this application on 11 September 2017.

[23] The high water mark of the urgency of the application seems to be in paragraph 13 of their founding affidavit which says:

"It is submitted that it is of utmost importance that a citizen of the Republic of South Africa should not be subjected to a criminal trial which trial rests upon a summons issued in contravention of a court order of the High Court and which is unlawful as is set out below. The prejudice and harm speaks for itself" (my emphasis).

[24] There is a question which immediately springs to mind and this is: having regard to what is said in paragraphs 22 and 23 above, can it seriously be said that the applicants have explicitly set forth the circumstances which they aver make their matter urgent? Lastly, can it also be seriously said that they have properly disclosed the reasons why they claim that they will not be afforded substantial redress at a hearing in due course? The answers to the questions, according to the respondents' counsel are emphatic no's. I fail to see how the questions can be answered in the positive because the provisions of Rule 6(12)(a) and (b) have clearly not been satisfied. One searches, in vain, in the applicants papers, for the circumstances and reasons referred to in Rule 6(12)(b).

[25] Mr Matebese, for the second respondent, submitted that the applicants failed to explicitly set forth the circumstances which make their case urgent as well as the reasons which demonstrate that they will not be afforded substantial redress in due course. Ms Nkosi-Thomas supports the submission which, in my view, is correct.

[26] Nothing, according to Mr Matebese, precludes the applicants, on the date of the hearing of the Alberton case under CAS number 799/11/2013, from seeking a postponement in order for them to be afforded an opportunity to exercise their alleged "right" of review of the decision to prosecute. The submission, in my view, has merit. This can also be done prior to the trial taking place.

[27] Section 179 (5)(d) of Act 108 of 1996 which is the Constitution of the Republic of South Africa, provides:

" Prosecuting authority

179 .

.. (5) The National Director of Public Prosecutions-

.. (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant." (my emphasis).

- [28] The representations which the applicants are worried about are clearly covered by Section 179(5)(d) of the Constitution. This clearly demonstrates that the applicants cannot, therefore, be heard to say that they cannot and will not be afforded substantial redress in due course. Nowhere, in their papers, do the applicants show that they have approached the first respondent for the review of the decision to prosecute. The application, in my view, is simply not urgent and deserves to be struck off with appropriate costs.
- [29] Ms Nkosi-Thomas correctly submitted that the NPA order sought to reinforce the applicants' rights to make representations to the NDPP for the purposes of reviewing the decision to prosecute. This, according to her, is not a right not to appear before a Court to have the charges put to them. The nub of their complaint appears to be that they have a right not to have charges put to them pursuant to an unlawful summons. The facts of the case and the interpretation of the NPA order demonstrates that this cannot be correct. If, according to them, the summons is unlawful, they have every right to challenge that. The summons, as it will be seen later, is not unlawful.
- [30] The first respondent's version is that the applicants' are not precluded from subjecting the decision to prosecute to a review as the summons leads them to Section 179(5)(d) read with paragraph 4 of the NPA order. I agree.
- [31] The applicants, indeed, have not been denied the right to make representations. Neither has the first respondent failed to carry out his constitutional obligation to consider the representations. It must be remembered that the first respondent has not yet been approached by the applicants. This, however, does not take away the applicants' rights in terms of Section 179(5)(d) of the Constitution.
- [32] It is unnecessary to consider the issue of whether or not urgency has been self-created. This, because the applicants have failed to satisfy the requirements of Rule 6(12). Urgency has not been proved and the application on this basis alone, deserves to be struck off with appropriate costs.
- [33] Ms Nkosi-Thomas regarded the conduct of the applicants' as a blatant abuse of the Court process. The submission, in my view, seems to have merit. It is bolstered by *in re Several matters on the roll 2013 (1) SA 549 SA (GSJ)*. Therein the Court said:

"[17] An abuse of the process has developed-in all likelihood in the hope that the respondents will not be able to file opposing affidavits in time-in order to steal a march upon such respondents. This practice must be addressed in order to stop matters being unnecessarily enrolled and clogging the urgent court roll. In these

matters sufficient time should be granted to the respondents to file affidavits, and they can rarely do so when the papers are served less than a week before a matter is to be heard. That week includes a weekend when the state machinery normally comes to a standstill. Practitioners would

be well advised to be more realistic and to afford state departments a more reasonable time in which to file affidavits. While there are no doubt matters which require urgent attention on shorter notice, amongst the 30 or so applications by foreigners to be released from custody that are on the roll today, I am struggling to find one that justifies a hearing today. If there are such matters, the affidavits generally fail to set out their urgency as required by the Practice Manual and rule 6." (my emphasis).

Ms Nkosi-Thomas, finally submitted that affording a state party such as the first respondent only two court days within which to file an answering affidavit in an application which ran into 170 pages, and with the history that the case has, was the best demonstration of abuse of the court process. I agree. This, according to her, called for punitive costs. There is merit in the submission.

[34] For the reasons which will appear here in below, it is unnecessary to deal with striking out of irrelevant matter.

[35] This then brings me to the issue whether or not the summons that is the subject matter was issued in violation of the NPA order. This, because the applicants' urge the Court to declare the summons in issue, annexure NOM1 to the Notice of Motion, to have been served in violation of the NPA order issued under case number 75378/16.

[36] Section 21 (1)(c) of the Superior Court Act 10 of 2013 deals with the vexed issue. The section provides:

"CHAPTER 6

Provisions applicable to High Court only

21. Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences friable within, its area of jurisdiction and all other matters of which it may according to law take cognizance and has the power-

...(c) in its discretion, and at the instance of any interested person. to enquire into and determine any existing, future or contingent right or obligation. notwithstanding that such person cannot claim any relief consequential upon the determination" (my emphasis).

[37] In sum, Section 21(1)(c) provides that a Court, at the instance of any interested person, has the power to enquire into, and to declare any existing, future, or contingent right or obligation.

[38] The case, very relevant to the issue, is Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (2006] 1 ALL SA 103 (SCA) where Jafta JA said:

"[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the

present must satisfy the court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.' (my emphasis).

[17] It seems to me that once the applicant has satisfied the court that he/she is interested in an 'existing, future or contingent right or obligation', the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that once satisfied that the applicant is an interested person, 'the Court must decide whether the case is a proper one for the exercise of the discretion' should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the court, the prerequisite

factors for the exercise of the discretion the court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection (cf *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A-E). (my emphasis).

[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes

the second leg of the enquiry." (my emphasis).

[39] The first leg of the enquiry, according to the case, involves establishing the existence of a necessary condition precedent for the exercise of the Court's jurisdiction. The applicants must establish that they have interest in an existing future, or contingent right or obligation. The Court will only proceed to the next leg once the requirement in the first leg is met. Put differently, the applicants must demonstrate that they have a right or obligation which may be existing, future or contingent. The right, however, must be more tangible than the mere

hope of a right, or mere anxiety about a possible obligation. (See: *Family Benefit Friendly Society v Commission For Inland Revenue and Another* 1995 (4) SA 120 (T)).

[40] The question which has to be answered is as to which right it is that the applicants claim to have which should be protected. To try and answer the question, we need to look at their papers. In paragraph 13 of their founding affidavit, the parties say:

"13.

It is submitted that it is of utmost importance that a citizen of the Republic of South Africa should not be subjected to a criminal trial which trial rests upon a Summons issued in contravention of a court order of the High Court and which is unlawful as is set out below. The prejudice and harm speaks for itself JI (my emphasis).

The applicants in paragraph 24.1 of their founding affidavit state:

"24

.. 24.1 The Applicants have made out a clear right. They have right to proper compliance with the court orders referred to.

[41] The applicants promised to set out grounds which demonstrate the unlawfulness of the summons "below". The said grounds seem to be those in paragraph 8 of the letter from the applicants attorneys to the third respondent, dated 9 March 2017. The paragraph reads:

"8. For the sake of completeness, we again draw your attention to the specific wording of paragraph 4 of the court order, which specifically provides for a review against the approval that charges be issued against our client, and not for a review after criminal charges had been instituted. Par 4 clearly makes provision for a review of the decision of Pretorius to approve the decision to

prosecute and it clearly does not provide for the institution of criminal charges and a review thereafter." (my emphasis).

[42] Ms Nkosi-Thomas, for the first and third respondents, submitted that the NPA order never creates special dispensation for the applicants.

Neither, according to her, does it confer any rights which the applicants do not enjoy in terms of the Constitution or any legislation. Her interpretation of the order is that it emphasises that the applicants have a right to make representation to the first respondent. The right, in any event, is covered by Section 179 (5)(d) of the Constitution as well as Section 22 (3) National Prosecuting Authority Act 32 of 1998.

[43] Ms Nkosi-Thoma,s for the first and third respondents, correctly submitted that the NPA order conferred on the applicants the right to make representations once the decision to prosecute was made. The right according to her, is conferred to them by Section 179 (5)(d) of the Constitution read with Section 22 (3) of the National Prosecuting Authority Act. Once the representations are made, the first respondent is then obliged to consider the

representations so made. The right, according to Ms Nkosi-Thomas, remains intact and the applicants have not yet exercised it. They are also not precluded from exercising it. Of significance, Ms Nkosi-Thomas submitted that the right to make presentations only accrues to an "accused person". Section 179(5)(d) of the Constitution clearly states that the first respondent "may review a decision to prosecute, after consulting the relevant Director of Public prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions from the following:

- (i) The accused person." (my emphasis).

[44] Ms Nkosi-Thomas submitted that the applicants are not entitled to make representations for the purposes of enabling the first respondent to review a decision to prosecute "before the issue of a summons with a charge sheet". She attributes this to the fact that the applicants, at the time, are not accused persons who are "facing criminal charges". Simple logic dictates that they, before the issue of summons and service on them of the summons with a charge sheet, do not know yet what they could stand accused of. At any rate, how could they make representations without having been informed of the charges. The submission of Mr Lamey; for the applicants', in my view, is unhelpful. Nowhere does the NPA order speak of the contents of the docket. The case which unveils the answer to the question: who is an accused person? is *Nel v Le Roux NO and Others* [1996] ZACC 6; 1996 (4) BCLR 592 (CC) at

[11] Ackerman J said:

"[11] The section 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of section 189(1) is not, in my view, an "accused person" for purposes of the protection afforded by section 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to the section 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution. The section 189(1) proceedings are not regarded as criminal proceedings, do not result in the examinee being convicted of any offence and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; in American parlance such examinees "carry the keys of their prison in their own pockets." The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee. This disposes of the attack directly based on the section 25(3) fair trial right." (my emphasis).

[45] Ms Nkosi-Thomas submitted that before a charge sheet is served, the person only faces criminal prosecution and for him to become an accused person, the charge sheet must be served informing him of the charges preferred against him. Only after this stage, according to her, can it be said that the person faces criminal prosecution which could result in a conviction. I agree.

[46] It can hardly be said that the applicants, before they were informed of the charges that were preferred against them, were "accused persons". They, before this stage, could not make representations because they knew nothing about the charges preferred against them.

[47] The applicants' attorneys in paragraph 11 of their letter to the third respondent, dated 9 March 2017, say:

"11. In order for our client to properly review Pretorius's decision the decision must be in writing and the content of the docket and all other information that was considered by Pretorius must be provided to our client. After consideration of the latter, proper representation can be drafted and submitted to the National Director of Public Prosecutions". (my emphasis).

The paragraph demonstrates the significance of first being informed about what the case is all about. This becomes possible once charges have been formulated and the applicants informed about them. This is not the position with the current application hence they, in paragraph 11, speak of the contents of the docket. The contents of the docket, to follow the standard procedures, according to Ms Nkosi-Thomas, can only be furnished once the applicants know of the charges that are preferred against them. Understanding the NPA order, and in particular, paragraphs 3 and 4 thereof will clearly demonstrate that service of the summons in no way contravenes to the NPA order. Finally, it is important to refer to two cases, namely, *Shabala v Attorney-General of Transvaal* [1995] ZACC 12; 1995 (2) SACR 761 (CC) ("the Shabalala case") and *S v Dlamini; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) ("the Dlamini, Joubert and Schietekat cases").

[48] At paragraph 56 of the Shabalala case Mahommed DP (as he then was, said:

"[56] In making the foregoing analysis I have addressed only the issue as to whether and in what circumstances the contents of witnesses' statements should or should not be disclosed to an accused person for the purposes of the proper conduct of the defence. The next issue which arises is when such disclosure must be made if the State fails to justify a refusal to allow the accused access to such material. In many cases such disclosure would be made at the time when the accused is acquainted with the charge or the indictment or immediately

thereafter. But if the prosecution succeeds in justifying its assertion that there is a reasonable risk that the disclosure of such material at that stage might impede the proper ends of justice and the Court does not exercise its discretion in favour of the accused at that time, it does not follow that the relevant statements or documents will necessarily remain forever protected during the course of the prosecution. (my emphasis).

At paragraph [82] of the Dlamini; Dladla; Joubert and Schietekat cases Kriegler J said:

"[82] Not that there should really have been much uncertainty in any event. Nothing that was said in Shabalala should lead anyone to believe that the defence is entitled to look over the prosecution's shoulder as the investigation runs its course. Mahomed DP, who expressed the unanimous view of this Court, was at pains to confine the judgment to an assessment of the impact of the fair trial demand of s 25(3) of the interim Constitution on (a) the rule in Steyn's case

and (b) the rule barring the defence from interviewing prosecution witnesses. The judgment makes it clear (in para{56) that disclosure of material in the police docket depends, among others, on the timing of the request. and that the risk of interference with the investigation is a factor to be weighed." (my emphasis).

[49] The two cases bolster Ms Nkosi-Thomas's submission that the NPA order, correctly interpreted, demonstrates and confirm that the contents of the docket can only and validly be disclosed to the applicants at the time when they are "acquainted with the charge sheet or immediately thereafter and not before". Indeed, the applicants could never have been acquainted with the charge sheet and summons before they were served on them. The interpretation of the NPA order, on behalf of the applicants, amounts to creating special dispensation for the applicants. It is also contrary to the review provisions and standard procedure clearly and aptly dealt with by Dr Pretorius in his affidavit.

[50] Ms Nkosi-Thomas submitted, correctly in my view, that the applicants demonstrated no right or obligation that become the subject of an enquiry in the first leg of this Court's exercise of its jurisdiction. I agree. The application for a declaratory relief,

according to Ms Nkosi-Thomas and Mr Matebese, ought to fail. I again agree.

[51] Granting the declaratory order, according to Ms Nkosi-Thoma, would result in the stay of applicants' prosecution, apart from it being a radical remedy, which in my view, would not be justified.

[52] The Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 at paragraph [38] dealing with radical relief said:

"[38]...(T)he relief the appellant seeks is radical. both philosophically and socio-politically. Barring the prosecution before the trial begins-and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused." (my emphasis).

[53] The application, aside from the fact that it fails to disclose the right which the applicants seek to have protected, is in my view,

premature. Their right to submit presentations to enable the first respondent to review the decision to prosecute remains intact. They have not yet approached the first respondent with such a request because they did not know what charges they faced before they were so informed. This conclusion renders it unnecessary for me to deal with the striking of irrelevant matter.

[54] It bears mentioning that Dr Pretorius approved the prosecution of the applicants. Annexures "JM1" and "JM2" to the first and third respondents' answering affidavits demonstrate this. They firstly demonstrate that the provisions of Section 179(5)(d) as well as the standard procedure were duly complied with. The fact that the applicants knew of this when the first and third respondents

filed their answering affidavit is of no moment.

[55] As correctly submitted by Ms Nkosi-Thomas for the first and third respondents and Mr Matebese, for the second respondent, the second applicant was not and is not a party in the NPA and SAPS orders. Nothing further need be said about her as she has no right to become a party of the order that was given.

[56] For the reasons I gave when I dealt with prayers 1 and 2 above, prayer 3 dealing with the interdictory relief is also not suitable.

[57] The summons is perfectly lawful. It neither contravenes the NPA nor SAPS orders. The applicants' failed to make out a proper case for the relief that they seek and their application, accordingly should be dismissed with appropriate costs.

[58] On 2 October 2017 I gave an order dismissing the application with costs and promised to furnish the reasons for so dismissing the application later. The above are the reasons.

COSTS

[59] I need only clarify the issue of costs. The applicants, in this application, sought an order for costs on a punitive scale while the respondents too, asked for costs on a punitive scale. The scale of costs was not clearly indicated. The costs that the court was referring to on 2 October 2017 were appropriate costs namely costs on a scale as between attorney and client which include costs of two Counsel. This, because of the importance and complexity of the matter.

ORDER

[60] The order, spelling out what the Court had in mind at the time of dismissing the application should therefore read:

The application is dismissed with costs on the scale as between attorney and client which costs include costs consequent upon the employment of two Counsel.

M.W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH

GAUTENG DIVISION OF THE HIGH COURT

PRETORIA

Date of hearing: 28 and 29 September 2017

Date of delivery of Order: 2 October 2017

Date of reasons furnished: 6 October 2017

Counsel for the Applicants: Adv A.T.Lamey

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